No. 410

IN THE

Supreme Court of the United States

October Term, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, appears at pages 411-435 of the Record. The opinion of the Civil Aeronautics Board appears at pages 199-211 of the Record and the dissenting opinion of one Board Member at pages 211-218 of the Record. The initial decision of the Hearing Examiner appears at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 437). The petition for writ of certiorari was filed on September 21, 1955, and was granted on November 14, 1955. The jurisdiction of this Court is based on 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a determination by the Civil Aeronautics Board under Section 411 of the Civil Aeronautics Act, that the issuance of an order enjoining an alleged unfair trade practice is "in the interest of the public," is subject to judicial review.

2. Whether a controversy centering around protection of a trademark or trade name owner against use by a competitor of an allegedly confusingly similar trade name involves "a specific and substantial public interest".

3. Whether, assuming the last question were answered in the affirmative, the lower court was correct in stating that the Civil Aeronautics Board erred in ordering complete excision of any reference to the common term "American" in respondent's corporate name while giving no consideration whatsoever to the possibility of a less drastic remedy.

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 1003 (1938), as amended 66 Stat. 628 (1952), 49 U. S. C. Sec. 491, reads as follows:

> "The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier or

ticket agent to cease and desist from such practices or methods of competition."

Pertinent excerpts from the similar Section 5 of the Federal Trade Commission Act are printed in the footnote.[1]

COUNTERSTATEMENT OF THE CASE.

Respondent, North American Airlines, Inc., originally incorporated as Twentieth Century Airlines, Inc., on May 4, 1946, in the State of North Carolina, holds a letter of registration as a large irregular air carrier issued in that name by the Civil Aeronautics Board issued July 22, 1947 (R. 171). Since April 21, 1951, respondent has engaged in air transportation under the trade name North American Airlines and North American, and on March 3, 1952, by an amendment to its certificate of incorporation, respondent changed its name to North American Airlines,

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[1] "Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges . . . Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing . . . and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938), 64 Stat. 21 (1950), 66 Stat. 632 (1953); 15 U.S.C. Sec. 45.

Inc. (R. 171). By a letter dated March 11, 1952, addressed to the Civil Aeronautics Board, respondent advised the Civil Aeronautics Board of the change of its corporate name and suggested a reissue of its letter of registration in that name (R. 171-172). At that time there was no Board regulation which purported to control or regulate the name under which a carrier might operate and no regulation requiring Board approval or permission to change a carrier's name. The Board did not reply to respondent's letter of March 11th, and more than five months later, on August 19, 1952, it adopted Regulation Serial No. ER-178, being Amendment No. 7 to Part 291 of its economic regulations under which it is made an express condition upon the operating authority granted to each large irregular carrier that unless otherwise authorized by the Board, such air carrier shall not hold out to the public and perform air transportation services in any name other than that appearing in its letter of registration. 14 C. F. R. § 291.28 (R. 295-297). In the introductory comment to its new regulation the Board states that where good will has been established in a name, the Board will deny permission to use that name only where, after notice and opportunity for a hearing, it is established that such use constitutes a violation of Section 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, as amended 66 Stat. 628, 49 U. S. C. Sec. 491 (R. 295-297). On October 6, 1952, respondent, in accordance with the requirements of the new regulation, applied to the Board for authorization to conduct its operations under its proper corporate name, *i. e.*, North American Airlines, Inc. (R. 1-3).

After respondent filed said application petitioner [2] filed a memorandum with the Civil Aeronautics Board claiming

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[2] **Petitioner is an air carrier which together with its predecessor company, American Airways, Inc., has been continuously engaged in air transportation since 1930 (R. 171).**

service mark infringement and unfair competition (R. 186). By its Order Serial No. E-7107, adopted on January 28, 1953, the Civil Aeronautics Board instituted an investigation, C. A. B. Docket No. 5928, to determine whether respondent in using its corporate name and derivatives thereof in air transportation, "has been and is" violating Section 411 of the Civil Aeronautics Act, *supra*, (R. 3-6). The said order consolidated for hearing, together with the investigation proceeding, respondent's application, C. A. B. Docket No. 5774 (R. 5-6). By Board Order No. E-7174 dated February 19, 1953, petitioner was permitted to intervene (R. 186).

The enforcement attorney for the Civil Aeronautics Board produced no witnesses and no evidence of any kind during the entire course of the hearing. For all practical purposes he participated solely as an observer. The only evidence produced, in an attempt to prove a Section 411 violation by respondent, was that produced by petitioner through its employees (R. 416). After respondent had filed its application on October 6, 1952, to change the name appearing on its letter of registration, officials of petitioner supervising the New York City, Chicago and Los Angeles areas were told by their superiors to have subordinates prepare affidavits, reports or notes, which would show confusion based on name similarity between petitioner and respondent *only* (R. 20, 25-26, 29-30, 75-77, 100-102). It was the duty of these area supervisors under these instructions to secure evidence with which to prove the alleged confusion. (R. 37, 77, 101-102). The Board's finding of public confusion rests solely upon testimony of employee witnesses from the New York and Los Angeles areas[3] concerning instances of alleged confusion.[4] Rela-

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[3] Of the 13 employee-witnesses produced by petitioner (R. 7-8, 20, 40-41, 48, 69, 75-76, 79, 85, 91, 93, 96, 97-98, 100-101) 7 performed duties which required them to have regular contact with the traveling public (R. 4-41, 48, 69, 79, 85, 91, 93). Of these 2

tive to the evidence, the lower court stated:

"The Board rejected, and decided it 'need not comment' upon, its Examiner's finding:

'There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good will and business reputation of American, or that American has been injured by such operation . . . .'

"Our examination of the record demonstrates that the Examiner was correct. Nor is there evidence that North American palmed itself off as American; that North American 'confused' American's passengers to the former's advantage; that North American's advertising was intended to or did entice American's passengers to fly North American, indeed it is difficult to assume that North American's advertising could be of the slightest advantage unless it could bring passengers to North American, rather than American. Nor is there evidence that North American flew a single passenger who paid its lower rate in the thought that he contracted for anything but North American's non-scheduled transportation, or that American was harmed otherwise than by the competition afforded by any irregular carrier. In

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were ticket agents (R. 40-41, 48), and 5 were telephone reservation agents (R. 69, 79, 85, 91, 93).

[4] R 201. An exception to personal observation of such alleged instances of the confusion was the testimony of employee Witness Berg (R. 201) concerning the painting of a sign by non-union painters (R. 23-24). Witness Berg had no actual knowledge of the facts concerning the sign in question (R. 23-24). His only connection with the affair was the preliminary phone call made presumably by a union representative who voiced his objection to Mr. Berg (R. 23-24). Witness Berg had a Mr. Nicholls handle the problem (R. 24). Mr. Nicholls did not testify during the hearing. It was never established during the hearing what the sign said or whether the sign was petitioner's, respondent's, or someone else's. Witness Berg testified that the union representative told Mr. Nicholls that the sign was that of respondent (R. 24); however, according to the affidavit submitted by Mr. Nicholls, Mr. Nicholls told the union representative that the sign was respondent's (R. 154-155).

short, *the public may have benefited, so far as the record shows,* and in any event, there is no demonstration that North American affirmatively acted in violation of a statute within the jurisdiction of the Board." (Emphasis supplied) (R. 417-418).

The Civil Aeronautics Board found that the use by respondent of its corporate name, derivatives of that name, "or any combination of the word 'American'" violated Section 411 of the Civil Aeronautics Act, *supra*, and ordered respondent and its agents to cease and desist from engaging in air transportation under its corporate name, derivatives thereof, "or any combination of the word 'American'" (R. 210-211, 229-230).

In an unanimous opinion, the lower court reversed the Board (R. 433). The lower court, quoting the Board's examiner stated:

> "'Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.'
>
> "The Examiner came almost to the heart of the problem; his error, like that of the Board, stems from the application of criteria which fell short of the public interest findings demanded by the law." (R. 418).

The Government did not petition for certiorari. On September 21, 1955, respondent below, American Airlines, Inc., filed a petition for certiorari which was granted on November 14, 1955.

SUMMARY OF ARGUMENT

1. The lower court correctly decided that the exercise of jurisdiction of the Civil Aeronautics Board under Section 411 of the Civil Aeronautics Act for the purpose of protecting "the public interest" was subject to judicial review.

It is clear from the legislative history of Section 411 that this section was closely patterned after Section 5 of the Federal Trade Commission Act and, as well established by this Court's decisions in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), *Federal Trade Commission* v. *Royal Milling Co. et al.*, 288 U.S. 212 (1933), and other precedents, the presence of a public interest is a jurisdictional requirement, the absence of which must lead to dismissal of the proceeding at any stage after its initiation. The rule of the *Klesner* case has not been devitalized and should not be abrogated, as petitioner here suggests, but under the circumstances of the present case should be strongly reaffirmed and reapplied. When last invoked in an enforcement proceeding under Section 5 (*Motion Picture Advertising Service Co., Inc.* v. *Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952)), the appellate court strongly relied on the *Klesner* rule and this Court, in reviewing the case, took no occasion to disturb that part of the appellate court's ruling. On the contrary, Mr. Justice Frankfurter, in a dissenting opinion which dealt with this particular problem, expressly quoted the *Klesner* doctrine with approval, as has the Federal Trade Commission itself in many recent proceedings (*In the Matter of Florida Citrus Mutual*, F. T. C. Docket No. 6074, 3 CCH Tr.Reg.Rep. 25076 (1954), and cases there cited).

2. The lower court's conclusion that the required "substantial and specific public interest" was lacking in the present case was entirely sound, and should be upheld by this Court under the rule of the KLESNER case and other recent precedents.

The hearing examiner in the present case made a specific finding to the effect that there was no evidence of fraud or intent to deceive the public (R. 197). This case involves no more than an attempt on the part of the intervenor, American Airlines, to seek a restraining order against a competitor on the ground that the latter's trade name may interfere with its alleged exclusive rights in the name American Airlines. This is a matter not peculiarly within the expert knowledge of the Civil Aeronautics Board, as petitioner claims, but a private dispute which should be tried before and decided by an equity court.

3. The petitioner's contention that the lower court erred in relying on a "long dog-eared dictum" of this Court (Pet. Br. 20) in FEDERAL TRADE COMMISSION v. GRATZ, 253 U.S. 421 (1920), for the purpose of showing that there could be no unfair method of competition in the absence of fraud, and on the decision of this Court in FEDERAL TRADE COMMISSION v. RALADAM CO., 283 U.S. 643 (1931), for the purpose of showing that there has to be "competition" before an unfair method of competition may be found, is clearly refuted by the lower court's specific and careful statement that reference to these two precedents was made only for the purpose of emphasizing the requirement of public interest and for no other purpose; indeed, the lower court expressly refers to the very amendment to the Federal Trade Commission Act in 1938 which, according to the petitioner the court overlooked (R. 424).

Nor is there any basis for petitioner's theory that, even if the analogy of Section 5 of the Federal Trade Commis-

sion Act would generally apply, more was intended to be left to the "expert judgment" of the Civil Aeronautics Board in the air transportation field than had been entrusted to the Federal Trade Commission in cases within its jurisdiction. Respondent will argue that problems of trade name protection, trademark infringement and the like are completely outside the special field of "expert knowledge" of the Board.

4. Even if this Court should disagree with the lower court and with respondent's contention that the Board exceeded its jurisdiction in issuing the order here under discussion, it should be set aside on the additional ground that the Board failed to give any consideration whatsoever to the question whether a remedy other than "complete excision" of respondent's trade name might adequately protect the public.

It is now well settled since this Court's decisions in the *Royal Milling Company* case, *supra*, p. 8, and in *Jacob H. Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), that cease and desist orders, while subject to limited judicial review in point of remedy, will be set aside or modified whenever the court is satisfied that the administrative agency has abused its discretion. Contrary to this Court's decision in the *Siegel* case, the Board, over the strong dissent of one of its Members, gave no consideration at all to the possibility of issuing an order which might have safeguarded the public against any possibility of confusion without at the same time depriving respondent of its well established trade name which, as the hearing examiner himself noted, had been selected in good faith and without any intention to deceive the public (R. 197).

ARGUMENT

I

THE DETERMINATION OF THE CIVIL AERONAUTICS BOARD THAT THE INSTITUTING OF A PROCEEDING AND THE ISSUANCE OF AN ORDER UNDER SECTION 411 OF THE CIVIL AERONAUTICS ACT WAS "IN THE INTEREST OF THE PUBLIC" IS SUBJECT TO JUDICIAL REVIEW.

1. A Preliminary Observation: The Economic and Political Background of the Controversy.

While the immediate issue now before the Court is limited to the specific question whether the order issued by the Civil Aeronautics Board, enjoining respondent absolutely from using its established corporate name or any other name including the word "American," involved a "specific and substantial public interest"—a question which the lower court unanimously answered in the negative—, respondent desires to suggest to the Court at the very outset that this case represents but one phase in the long standing controversy [5] with respect to right of

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[5] Any application by non-grandfather applicants since the Board was created in 1938 to engage in transportation of passengers in competition with grandfather carriers has been denied. S. Rep. 540, 82d Cong., 1st Sess., "Report on Role of Irregular Airlines in United States Air Transportation Industry" (July 10, 1951); S. Rep. 822, 83d Cong., 1st Sess.; S. Rep. 1068, 82d Cong., 2d Sess. See also, *Additional Service to Atlanta and Birmingham*, 2 C.A.B. 447, 479 (1941); *Middle Atlantic Area Case*, 9 C.A.B. 131, 183 (1948); *Trans-Continental Coach Case*, 14 C.A.B. 720 (1951); *Additional Service to Puerto Rico Case*, 10 C.A.B. 430 (1951); *Southern Service to the West Case*, 12 C.A.B. 518, 534-535 (1951); *American Airlines* v. *Civil Aeronautics Board*, 192 F.2d 417 (D.C. Cir. 1951); *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (7th Cir. 1949).

In Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, Mr. Stanley Gewirtz, representing the

entry of new air carrier operators into the major air transport markets in competition with the so-called "grandfather"[3] carriers who received their operating authority upon adoption of the Civil Aeronautics Act in 1938. Any suggestion that a finding by the Civil Aeronautics Board of "a public interest" may not be subject to judicial review would, of course, have to presuppose that the Board in its regulation of the air transport industry, particularly with respect to competition and right of entry of new operators, is guided solely by considerations of the public welfare as a whole, rather than by a policy of fostering the private interests of those relatively few certificated airlines for whose protection the so-called "grandfather" clause of the Civil Aeronautics Act of 1938 was enacted.

Respondent would be naturally reluctant, under ordinary circumstances, to cast any suspicion or doubt upon a Government agency's efforts to act as a true servant of the general public; but the attitude of the Civil Aeronautics Board which has effected total exclusion from participation in this industry of every applicant who would compete for passengers with the grandfather carriers, a policy which has long been an issue of public debate and Congressional attention, cannot be entirely

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Air Transport Association, a trade association for grandfather carriers and most of the other certificated air carriers, testified as follows:

"Mr. Rodino: Has the ATA at any time favored the entry of new carriers into the business, either in Board proceedings or in testimony before Congress on legislation liberalizing entry standards?

"Mr. Gerwitz: I would say no, we have not, and I do not propose to do it today." Current Antitrust Problems, Hearings before Antitrust Subcommittee of House Committee on the Judiciary, H. Rep., 84th Congress, p. 2558 (1955).

See also cases pending before the U.S. Court of Appeals for the District of Columbia Circuit reviewing recent certificate proceedings of the Board pursuant to a petition for review filed by respondent, U. S. App. D. C., C.A. Nos. 12947; 13053; 13132.

ignored as background material of paramount significance in reviewing Board decisions which seek to restrict or, indeed, eventually eliminate all competition on the part of the non-grandfather operators. Thus, the Senate Select Committee on Small Business, in 1951, recommended to the Board that it should "reassess its whole approach" toward air transportation with regard to nonscheduled operators.[6] The report said:

> "In 1946, with the development of the nonscheduled air carriers, a new type of operation was introduced, which had a shattering effect on the concept that air travel must necessarily be an elite type of luxury. The CAB during this recent period has been reluctant to recognize and protect the new enterprises, preferring to cling to the traditional position that American aviation transportation must perforce remain the exclusive franchise of the certified carriers." (p. 16).

The following year, the Committee's Annual Report was even more outspoken and critical. It said:

> "Since World War II, a new type of air transportation, not necessarily competing with the large subsidized airlines, has been developed by a number of enterprising, small irregular or 'nonscheduled' air-transport companies. Over the past 3 years these companies have encountered 'competition by regulation' in a singularly frank demonstration of this technique. The regulatory body, in this instance the Civil Aeronautics Board, by the mere exercise of an administrative whim, has almost brought about the complete elimination of these small airlines."[7]

Again, in an Annual Report of March 1953, the same criticism was repeated still more strongly:

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[6] S. Rep. 540, 82d Cong., 1st Sess., "Report on Role of Irregular Airlines in United States Air Transportation Industry" (July 10, 1951).

[7] S. Rep. 1068, 82d Cong., 2d Sess.

"The CAB action against the irregular airlines, who were the originators of low-cost aircoach, took a number of forms, ranging from mild harrassment to outright elimination of some of the carriers . . . . The future growth, and even the continued existence of the independent airlines is in jeopardy. CAB's method of inducing 'death by delay' and 'strangulation by regulation' are just as fatal in the long run as outright elimination—which action the CAB apparently hesitates to take."[8]

In its report on the "Future of Irregular Airlines," July 31, 1953,[9] the Select Committee on Small Business recommended that the door should be kept open to the operation of these airlines and that the Board should not, through enforcement proceedings, "put out of business the economically significant elements of this industry within a short time" (p. 17).

This basic issue again received Congressional attention during the current hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, on August 24, 1955. In testifying before the Committee, Professor Walter Adams, an Economics professor at Michigan State University and a Member of the Attorney General's National Committee to Study the Antitrust Laws, strongly criticized the Board's attitude toward nonscheduled airlines, and particularly respondent, in the following words:

"Similarly, I believe that the CAB's power to crush competition and to protect the entrenched position of the 'grandfather' carriers should be severely circumscribed. As you know, the CAB has recently pronounced a death sentence on North American Airlines, the largest nonsked passenger line in the country—the company which has innovated air coach and whose only crime, according to one of its officials, was

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[8] S. Rep. 822, 83d Cong., 1st Sess.

[9] "A Study of the Antitrust Laws," Part 3, Distribution Practices, August 23 to Sept. 2, 1955.

flying too many people too regularly too safely at too low a price.

"If this committee wants an agenda for action—if it wants to strike an effective blow for competition—here, it seems to me, is a good starting place.

"Not only should the death sentence against North American be revoked, but the company should be allowed to enter the airline industry on a permanent basis, so that it could bring its dynamic and progressive brand of competition to this expanding field." (*Hearings*, p. 1009).[10]

It is common knowledge by now that without the pioneering efforts of the non-certificated carriers, particularly this respondent, there would at best have been long delay in the development of the aircoach service which the certified air carriers were eventually forced to supply after having persisted until quite recently in the attitude that such aircoach service would have allegedly disastrous consequences for the industry.[11]

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[10] The same authority elaborates on this exact point in his recent book, "Monopoly in America" (Adams, Gray, 1955), giving detailed quotations from the expressions of hostility of the certified airlines and of the Board toward the low price competition offered by the nonscheduled airlines.

[11] As late as May 1949, Mr. C. R. Smith, President of American Airlines, testified before the Johnson Committee as follows:

> "We do not believe that we can presently engage in the coach service and provide the standard of service reasonably required without consequent loss and without, perhaps, getting our organization back into the subsidy situation." Airline Industry Investigation, Hearings before the Committee on Interstate & Foreign Commerce, U.S. Senate, 81st Congress, pp. 756-757 (1949).

Mr. Patterson, President of United Airlines, was even more reluctant to engage in the business. He stated:

> ". . . if we had a little margin to work on we could experiment with coach, we could experiment with many things, but we *just cannot afford to take the chance* where we may affect, or create, greater losses than are staring us in the face right now." (Emphasis added).

We submit that, in considering the narrower "public interest" aspect involved in this controversy, the Members of this Court may not want to close their eyes to the fact that we may have here one of those situations in which an independent regulatory agency has, in considering the general public interest, so merged the private interest of the major members of the regulated industry with the overall public interest for whose protection the agency was created as to lose sight of the latter for the benefit of the former. Only about a month ago, a study entitled "Regulating Business by Independent Commission,"[12] was published at Princeton by one of that University's outstanding economists, who prepared this study upon the suggestion of the Assistant Director of the U.S. Bureau of the Budget. The chapter entitled "Search for the Public Interest" (page 154) opens with the following significant paragraph:

> "Discussions of the 'public interest' that commissions are supposed to seek frequently seem unreal. Usually the public interest is conceived as a balancing by a commission of the interests involved in regulation. In its search for an equilibrium among the interested parties, it is assumed that a commission will be guided by its legislative mandate. *Unreality begins to creep in, however, as soon as it appears that the commission's enabling statute may in fact provide only the most general guide to the goals of regulatory policy. Left largely to its own resources, which are apt to be weak relative to the strengths of the organized parties, a commission will probably be guided by dominant interests in the regulated industry in its formulation of the public interest. Thus the public interest may become more private than public.*" (Emphasis added).

This, we submit, is exactly what has happened in the segment of administrative regulation presently under discussion. The action of the Civil Aeronautics Board, enjoin-

[12] Bernstein, Marver H. (1955).

ing respondent from continued use of its lawfully adopted name, is not only unprecedented, as the lower court correctly pointed out, but was instigated and conducted solely in the interest of the "intervenor," American Airlines, for the purpose of protecting its private interests and with the objective of furthering its efforts to eliminate from the air transport industry the remaining active opposition to Board policies which coincide with those advanced in the interests of the grandfather carriers.

The Court will also note in this respect that apparently the Government did not consider this matter to involve a sufficiently substantial public interest to justify the filing of a petition for certiorari on its part; as a result, while this controversy was originally entitled North American Airlines, Inc. v. Civil Aeronautics Board, American Airlines, Inc., Intervenor, it has in this Court been designated American Airlines, Inc., Petitioner, v. North American Airlines, Inc., Respondent, which in itself is a strong affirmation of the view here expressed that the Board, from the very beginning, acted in this case not on behalf of the public but overwhelmingly in the private interest of the largest member of the industry.

2. The Issue of "Public Interest" Under Section 411 of the Civil Aeronautics Act Is Subject to Judicial Review.

When the "public interest" requirement is viewed in the light of the Congressional and economic background to which we have invited the Court's attention in our introductory observations, it becomes immediately apparent that an issue of such paramount importance to the business community in general and to the American public could never have been intended to be withdrawn entirely from judicial review. On the contrary, it has never been seriously questioned, since this Court's decision in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929),

that the existence of a substantial public interest is a jurisdictional prerequisite in those cases in which the statute specifically imposes a duty upon an administrative body to proceed only when the public interest is involved. In the *Klesner* case, this Court said:

> "The order here sought to be enforced was entered upon a complaint which had in terms been authorized by a resolution of the Commission. The resolution declared, in an appropriate form, both that the Commission had reason to believe that Klesner was violating Section 5, and that it appeared to the Commission that a proceeding by it in respect thereof would be to the interest of the public. Thus, the resolution was sufficient to confer upon the Commission jurisdiction of the complaint. Section 5 makes the Commission's finding of facts conclusive, if supported by evidence. Its preliminary determination that institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. *If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.*" (Emphasis added) (280 U.S. 19, 29 and 30).

The Court thus made it clear that, even though the Commission's original administrative determination to institute a proceeding or, at least, an investigation into a matter which appears to involve a public interest would not ordinarily be reviewed, the subsequent issuance of a complaint and, even more, the issuance of a cease and desist order are always subject to the challenge that the original assumption of the presence of a public interest

is not borne out by the facts before the agency at the time when a decision has to be made of a quasi judicial nature concerning the issuance of a complaint, or an order to cease and desist. The petitioner's brief asks this Court not to apply this thoroughly well established rule in the present case on two grounds (not including petitioner's additional argument that the lower court erred in characterizing the present controversy as one involving primarily private rights, which should be adjudicated in a court of equity; this portion of petitioner's brief is considered separately below in Part III).

A. The Rule of the Klesner Case Has Not Lost Its Vitality, but Is Established Law Today.

In the first place, petitioner asks this Court to "reconsider" this part of the *Klesner* decision on the ground that review of the public interest issue "would inject the courts into an area of inquiry peculiarly administrative in character and inappropriate for judicial examination" (Pet.Br. 36). Moreover, it is suggested that the *Klesner* case has lost its vitality (Pet. Br. 32) and that "in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions (Pet. Br. 36).

We submit that the exact opposite is true, and that subsequent decisions by this Court, as well as by the lower courts and many rulings on the part of the Federal Trade Commission itself conclusively show that the reviewability of the public interest has remained an important characteristic of the modern law of administrative procedure and that our preliminary comments will have sufficed to demonstrate that the *Klesner* rule should remain as one of the bulwarks and safeguards against abuses of administrative discretion. Several years after the *Klesner* case, this Court stated in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216(1933):

"To sustain the orders of the Commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

Similar language is found in this Court's decision in *Federal Trade Commission* v. *Raladam Co.* 283 U.S. 643 (1931). Even in *Moretrench Corp.* v. *Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942), on a dictum of which petitioner places particular reliance (Pet.Br. 36), Judge Learned Hand emphasized that the *Klesner* case "did indeed decide that the public interest in the controversy was a justiciable issue . . . ." (127 F.2d 792, 795).

The decisions of various courts of appeals in other circuits are to the same effect. See *Branch* v. *Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944); *Flynn & Emrich Co.* v. *Federal Trade Commission*, 52 F.2d 836 (4th Cir. 1931). Most recently, this allegedly devitalized doctrine was squarely applied by the Court of Appeals for the Fifth Circuit in *Motion Picture Advertising Service Co., Inc.* v. *Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952).[13] The court there decided the case on the merits and found no actionable violation of Section 5 of the Federal Trade Commission Act on the part of the respondent, but observed that in its opinion, the case should have been dismissed by the Commission itself for lack of a public interest. The court said in this respect:

"If it appears at any time in the course of a proceeding such as this that it is not in the public interest, the Commission should dismiss the complaint. If the Commission fails to do it, 'the court should, without inquiry into the merits, dismiss the suit.' Federal Trade Commission v. Klesner, 280 U.S. 19,

[13] The lower court's decision was reversed by this Court on other grounds. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953).

30, 50 S.Ct. 1, 4, 74 L.Ed. 138, 68 A.L.R. 838, 846. *We have not exercised this power but have decided the case on its merits, though it does not appear to be in the public interest to increase the number or amount of advertisements of this character. The Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change the definition of unfair methods of competition as laid down by the courts prior to its enactment. Federal Trade Commission v. Klesner, supra.*" (Emphasis added) (194 F.2d 633, 637).

A majority of this Court held, in regard to the merits of the controversy, that a violation of Section 5 had been established, without passing on the lower court's observations with regard to the public interest requirement. There is no suggestion in Mr. Justice Douglas' majority opinion that the Court intended, in any way, to modify or "reconsider" the *Klesner* rule, or that it had any doubt whatsoever with regard to the reviewability of this issue by the Court. On the contrary, Mr. Justice Frankfurter in his dissenting opinion in which Mr. Justice Burton joined, suggested that the case should have been remanded to the Commission "for adequate explanation of the reasons why the public interest requires its intervention and this order." (344 U.S. 392, 404). The *Klesner* case is then specifically referred to as supporting this view. "Until Congress chooses" (to face the problems raised by withholding judicial review of determinations by the Commission), "we cannot shirk our duty by leaving determinations of law to the discretion of the Federal Trade Commission," observed Mr. Justice Frankfurter.

The Federal Trade Commission, itself, has demonstrated on numerous occasions its complete awareness of the significance of the question of public interest, even within its own administrative operations. Whenever the Commission as a whole is satisfied, be it at the time of the filing of a complaint or at any subse-

quent time in a proceeding, that the required public interest is lacking, the complaint will be dismissed on that ground without any decision on the merits.[14] Indeed, it seems that the only controversial issue within the Commission today involves the right of the *hearing examiner* to dismiss a proceeding on motion without deciding the case on the merits, on the ground that he has become satisfied that the Commission erred in authorizing the filing of the complaint.

A three-to-one majority of the Commission, in an opinion written by Commissioner Mason in *In the Matter of Florida Citrus Mutual,*[15] came to the conclusion that, *prior* to the issuance of the complaint and *prior* to trial, the administrative discretion of the Commission regarding the existence of public interest was not subject to review and that it was reviewable on this point only *after* trial. It was therefore held that an allegation of lack of public interest did not present an issue on which a Hearing Examiner had authority to rule. However, Chairman Howrey, although concurring in the result, reached the conclusion that the public interest issue was a part of the adjudicatory responsibilities of the Hearing Examiner and could properly be passed upon by him upon motion to dismiss. Former Chairman Howrey made the following lucid observations in this connection:

> "It may be helpful, at the risk of repetition, to consider the question of public interest as coming to bear at two stages: (1) as justifying the issuance of a complaint, and (2) as justifying a cease and de-

[14] See *In the Matters of Wildroot Co., Inc.*, 5928, 49 F.T.C.D. 1578 (1953); *Denver Chemical Mfg. Co.*, 3 CCH Tr.Reg.Rep. 25070 (1954); *Metal Lathe Mfrs. Assn.*, 3 CCH Tr.Reg.Rep. 25076 (1954), and numerous others.

[15] Commissioner Mead did not participate in the proceeding. F.T.C. Docket No. 6074—Opinion of the Commission, May 14, 1954.

sist order. The Commission's decision to issue a complaint is, as we have indicated, a matter of administrative discretion. The Commission's decision to issue an order, on the other hand, is adjudicatory and reviewable in the courts. In considering the issue of 'public interest' after complaint, the hearing examiner is looking toward the second stage. It is his duty to make a decision that will stand up before the Commission and in court. The Commission's decision to issue a complaint merely means that it is at that time, in its administrative capacity, of the opinion that the public interest requires a proceeding. It cannot mean that the Commission is of the opinion, in its adjudicatory capacity, that it is to the interest of the public to issue an order, for that would be to prejudge the case and do violence to fundamental principles of administrative and constitutional law."

Not only is the *Klesner* case relied on in support of this view, but the former Chairman also refers to a Commission directive which specifically requires the Hearing Examiners to include a finding on the public interest issue in their decisions. In observing that motions to dismiss for lack of public interest at this early stage should be granted only in exceptional cases, Mr. Howrey concluded:

> "In exceptional instances, like the *Klesner* case, for example, the hearing examiner should by all means consider and decide the matter on a preliminary motion. This is consistent with recent decisions of the Commission, with court cases, and with the best interests of the public—which include economies resulting from early focusing on the decisive issue and speedy disposition of cases."

Enough has been said, we submit, to demonstrate that the *Klesner* rule, far from having lost its vitality or being "of only minor importance", has remained a highly significant feature of our administrative law, and that the present controversy is eloquent proof of the need for its reaffirmance, rather than its reconsideration.

B. The Public Interest Requirement in Section 411 of the Civil Aeronautics Act Is Not Different either in Substance or Procedure from the Identical Requirement in Section 5 of the Federal Trade Commission Act.

The petitioner also suggests in its brief (p. 32) that the *Klesner* rule, even if still the law with regard to Federal Trade Commission proceedings, should find no application to proceedings under Section 411 of the Civil Aeronautics Act because of the somewhat different wording of that section. It clearly appears, however, from comparison of Section 5 of the Federal Trade Commission Act and Section 411 of the Civil Aeronautics Act that the fact that the latter expresses in two sentences what the former includes in one was not intended to make any more difference in the result than the fact that in the former act, the language "if it should appear to the Commission" is used, while in the latter, the statute says:

"If it [the Board] considers . . .". In others words, the petitioner suggests (Pet. Br. 32) that once the Civil Aeronautics Board has decided to investigate a matter on the assumption that the public interest may be involved, it *must* issue a cease and desist order even if it should subsequently be found that the alleged public interest was wanting. Nothing in the legislative history of the Act would support such interpretation, particularly since the very wording of Section 5 of the Federal Trade Commission Act would seem to make it equally mandatory upon the Commission ("shall issue and serve . . ." Sec. 5 (b)) to file a complaint, without at that time reviewing the public interest issue. Actually, the only difference between the two acts is one of procedure, in that under the Federal Trade Commission Act a formal complaint is filed, while Section 411 of the Civil Aeronautics Act dispenses with the filing thereof. But both Agencies have undoubtedly a statutory obligation to review the public interest issue before any final order is issued. That this was the legislative intent behind Section 411 is, more-

over, clear from the history of this section as extensively discussed in Part II of the lower court's opinion (R. 419), and particularly from the quoted testimony of Commissioner Eastman, who stated that Section 411 was "substantially a duplicate of the provisions under the Federal Trade Commission Act . . ." (R. 422).

Petitioner cannot, therefore, derive any support for its view from the fact that the respective statutory provisions here under discussion show some minor and in fact only editorial differences in exact wording.[16]

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[16] This is true also with regard to another difference in language on which petitioner seeks to rely. It suggests (Pet. Cert. p. 5) that the Civil Aeronautics Act empowers the Board to issue its complaint either "upon its own initiative or upon complaint by any air carrier, etc." It is true that the language "or upon complaint by any air carrier, etc." has no verbatim counterpart in Section 5 of the Federal Trade Commission Act, but this, too, was not intended to bring about a change in administrative practice nor has it been so interpreted. On the contrary, the Federal Trade Commission in its own rules makes it abundantly clear that it will proceed either upon its own initiative or upon complaint of any party whose interests may have been adversely affected. Attention is called in this regard to *Rules of Practice, Procedure, Organization and Acts, Federal Trade Commission* (May 1955), Secs. 1.12 and 1.13; p. 7; moreover, Section 5 of the Federal Trade Commission Act itself expressly provides: (b) "any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." Such interventions have frequently been sought and permitted in recent years, including, for instance, intervention by the State of Florida in the above mentioned *Florida Citrus* litigation, *supra*, p. 22. It is true that the Federal Trade Commission rules also note, in paragraph 1.14, that an applicant should never be regarded as a "party" because "the Commission acts only in the public interest". This should be true too in analogous proceedings under Section 411, and we submit that the section was never intended to empower the Board to make its facilities and sanctions available to an intervenor who actually seeks a restraining order against use of an allegedly infringing trade name or trademark under a pretext of "public interest."

II

THE COURT BELOW WAS CORRECT IN SETTING ASIDE THE BOARD'S ORDER FOR LACK OF A "SPECIFIC AND SUBSTANTIAL PUBLIC INTEREST".

We now come to the substantive rule of the *Klesner* case and its applicability to the present controversy.

1. It Is Still the Law Today That the Presence of a Specific and Substantial Public Interest Is an Indispensable Jurisdictional Requirement.

The lower court placed reliance upon this Court's decision in *Federal Trade Commission* v. *Klesner,* not only for its conclusion that the presence of a substantial public interest was subject to judicial review, but also for the teaching of that famous case, as well as this Court's subsequent decision in *Federal Trade Commission* v. *Royal Milling Co.,* 288 U.S. 212 (1933), that the Federal Trade Commission, under Section 5 of the Federal Trade Commission Act—or, in this case, the Civil Aeronautics Board under the almost identically worded Section 411 of the Civil Aeronautics Act—is not the proper forum to adjudicate controversies of a primarily private nature, including particularly cases involving alleged trademark or trade-name infringement. Mr. Justice Brandeis in the *Klesner* case, which, as does this case, involved a controversy over a trade name, laid down the applicable test in the following classic language which has been repeatedly referred to in subsequent decisions of this Court, and was neither reversed, modified, or changed by the enactment in 1938 of the Wheeler-Lea Act:

> "A complaint may be filed only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.' This

requirement is not satisfied by proof that there has been misapprehension and *confusion on the part of* purchasers, or even that they have been deceived,—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by 'passing off,' proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right." (280 U.S. 19, 27).

And again:

> "In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest." (280 U.S. 19, 28).

In the *Royal Milling Company* case, *supra*, p. 26, decided four years later, this Court reaffirmed the *Klesner* doctrine, even though it was there held that actual fraud and misrepresentation, a species of deception was present, the suppression of which involved "a specific and substantial public interest." But, at the same time, the Court observed:

> "It is true, as this court held in *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not enough. The public interest must be specific and substantial." (288 U.S. 212, 216).

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935), the Court, in examining the

Commission's jurisdiction under Section 5, once more referred to the requirement of a specific and substantial public interest, expressly citing the *Klesner* decision in this respect.

The petitioner's brief refers to the fundamental doctrine of the *Klesner* case as having little, if any, "vitality" today (Pet. Br. 32). Indeed, it is suggested "that in the quarter century since the decision in the *Klesner* case it has been of little, if any, significance save to evoke an occasional form of words in judicial opinions." (Pet. Br. 36). Consequently, this Court is invited by petitioner to "reconsider" the *Klesner* doctrine (Pet. Br. 37).

We shall now proceed to show that neither the cases nor the other authorities referred to in petitioner's brief bear out this proposition but, on the contrary, strongly suggest that the present controversy may present a welcome opportunity to this Court to limit the jurisdiction of independent Government agencies to those matters which are deemed to be within their separate and special expert knowledge and which involve a paramount public interest.

Let us begin by consulting some of the evidence available from sources going back to the very formation of the Commission. We find in this regard that one of the House conference managers and chairman of the subcommittee in charge of the Federal Trade Commission bill, made the following statement in 1914:

> "[the public interest clause of section 5] prevents the commission from becoming a clearing house to settle the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts." 51 Cong. Rec. 14930 (1914).

Nelson B. Gaskill, who served as a Federal Trade Commission Chairman and Member, and who also wrote

The Regulation of Competition (New York, 1936),[17] had this to say with regard to the public interest requirement in *Proceedings, Academy of Political Science*, Vol. 11, No. 4 (January 1926), at pp. 122-123:

> "The Commission view has been that this procedural direction was in the nature of a saving clause which afforded an administrative discretion of non-action when it might not agree with a complainant that the law had been violated, or of refraining from the issue of a complaint otherwise justified, when it might not seem to serve the public interest by doing so. *The judiciary at first seemed to concur in this interpretation, but a trend of difference began to appear until it is now settled law that public interest in the suppression of a chosen method of unfair competition is a justiciable issue which must be charged and proven.*" (Emphasis added).

Particularly revealing are the observations of Gerard C. Henderson in his book, *The Federal Trade Commission* (Yale University Press, 1924), which is rightly referred to by petitioner as a "landmark work" on the subject of the Commission. While the author quotes the Federal Trade Commission itself as having taken the view in one of its early annual reports (1920) that the issue of public interest was not subject to judicial review (this was, of course, several years before this Court's decision in the *Klesner* case), Mr. Henderson goes all out in suggesting that trademark and trade name controversies of the type here involved should remain outside the Commission's general jurisdiction in the absence of certain exceptional circumstances (fraud, restraint of trade, etc.) which are not present here (Henderson, *The Federal Trade Commission*, p. 169 *et seq.*). Henderson refers to "a series of 'conference rulings'" in which the Commission went on record that the public interest would not ordinarily warrant the issuance of a com-

[17] The *Klesner* case is dealt with at length, beginning at p. 80.

plaint where issues of infringement of patents, copyrights, or *registered trademarks were involved.*[18] The author says:

> "Where there is a real dispute as to the substantive rights of the parties, where, for instance, each party claims in good faith the right to use a trade name or design, the tribunal must be in a position to render a decision which is just, impartial, and binding on the parties. Where, on the other hand, the rights of the complainant are clearly established, the problem is one of enforcement, and the tribunal must be equipped to compel prompt and complete obedience to its orders, and to secure effective redress for past injuries. The Federal Trade Commission cannot properly perform either of these tasks." [19]

The argument that there is a legitimate place for the Commission (or, here, the Civil Aeronautics Board) to appear in such cases "as the protector of the weak against the strong" is met with the observation that in actual practice, the companies for whose protection complaints have been issued by the Commission all involve large corporations whose officials "would hardly admit that they were applying, *in forma pauperis*, to have the Government assume the expense of their private litigations." [20] Henderson rightfully suggests that public funds should not be expended by a Governmental agency to relieve a corporation of the burden of proving a trade name infringement case for which a remedy would lie in a court of law or equity.[21] If we be permitted to quote once more from this leading treatise, we will find that among the conclusions reached by the author, the following recommendation is made:

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[18] Conference rulings Nos. 74, 58, 46, and 68 (I F.T.C.D. 560, 554, 548 and 547, respectively).

[19] *Id.*, pp 172, 173.

[20] *Id.*, p. 175.

[21] *Id.*, p. 228.

"It seems to me that the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases involving controversies between private parties, where a full and adequate remedy can be obtained in a court of law or equity."[22]

~~[22] Id., p. 337.~~

Nor is there any basis for petitioner's contention that decisions by lower courts subsequent to this Court's decision in the *Klesner* case have served to devitalize the *Klesner* rule; on the contrary, a careful review of these decisions will reveal that in the vast majority of cases involving misuse of a trademark or trade name far more was involved than the "*confusion*" (Judge Danaher's quotation marks, opinion, R. 415) found attributable by the Board to respondent's use of its trade name. In *Flynn & Emrich Co.* v. *F.T.C.*, 52 F.2d 836 (4th Cir. 1931), the Court of Appeals set aside the Commission's order for lack of public interest in the following words:

"The case here is rather a controversy of a private and personal nature between the petitioner and the Perfection Company, and could have been readily settled in the courts, and if a proper case were made an injunction would have issued against the petitioner. Certainly Congress never intended that the machinery of the Federal Trade Commission, severe as its operation can be made, should be set in motion for the settlement of private controversies, when the courts can act. The official character of the Commission makes it all the more necessary that it act only when the public interest is involved. It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce." (52 F.2d 836, 838).

In *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 160 F.2d 121 (7th Cir. 1947), the Court of Appeals set

22 Id., p. 337.

aside the Commission's order on the ground that the acts there involved had not been shown to be "all to the prejudice and injury of the public" (160 F.2d 121, at 124), but were complained of by a group of competitors who were unsuccessful in meeting the cheaper prices of the petitioner's products. In the few cases in which infringement of trademark or trade name was found to be actionable under Section 5 of the Federal Trade Commission Act, additional factors of gross deception of the public were invariably involved. Such, for instance, was the much quoted case of *Federal Trade Commission* v. *Balme*, 23 F.2d 615 (2d Cir. 1928), *cert. denied*, 277 U.S. 598 (1928), in which the respondent was enjoined from using certain designations which falsely indicated French origin of its product, and which involved in addition to charges of a trade name infringement numerous instances of deliberate passing off. The Commission's order was upheld and sufficient public interest found to exist on the ground of false and misleading advertising, which included, among other dishonest practices, a deliberately misleading use of a trade name.

Similarly, in *Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Commission*, 122 F.2d 158 (3d Cir. 1941), twice referred to in petitioner's brief (at pages 22 and 25), use by defendant of the famous trademark "Remington" on radio tubes was enjoined on the ground that the defendant had deliberately adopted an extensively advertised name for the purpose of injuring the business of present or potential rivals and that the result of its practice was "that purchasers of 5800 radios from 1935 to 1939 may have been deceived into purchasing an article which they might not have bought if correctly informed as to its origin" (122 F.2d 158, at 161). The court was of the opinion that the public was entitled to be protected against this "species of deception". Although it may well be doubted whether the court was justified,

even in the light of the facts in the "Remington" case, in sustaining the Commission's order on the basis of a substantial public interest, the opinion itself quoted the following passage from the *Klesner* decision:

> "To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." (280 U.S. 19, at 28).

None of these elements referred to by Mr. Justice Brandeis in *Klesner* as possible bases for the finding of a public interest can, of course, be found in the present case. Certainly, the use of this respondent's trade name does not "threaten the existence of present or potential competition;" on the contrary, unremitting efforts of the large certified air carriers and the Board threaten to eliminate all competition by non-grandfather operators.[23] Nor do we have here the "flagrant oppression of the weak by the strong" as an unfair method employed by respondent, but rather the exactly reverse situation. Nor could the petitioner, American Airlines, Inc., be heard to argue that this matter was too insignificant for it and others affected to institute the appropriate civil litigation.

The element of strong and deliberate deception of the

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[23] See note 5 *supra*.

public was present not only in the cases previously referred to but was also present in *Federal Trade Commission* v. *Real Products Corporation*, 90 F.2d 617 (2d Cir. 1937), involving flagrant misuse of the word "Champion", and in *Moretrench Corporation* v. *Federal Trade Commission*, 127 F.2d 792 (2d Cir. 1942), so strongly relied upon by petitioner (Pet. Br. p. 25).[24] It was there found that certain advertising claims made by respondent were palpably misleading and that therefore a substantial public interest within the *Klesner* rule was present. It is true that at that time (1942), Judge Learned Hand did express some doubt with regard to the actual scope of the *Klesner* rule but subsequent decisions by the same court—and particularly, the most recent ones—show that the doctrine is very much alive in the Second Circuit in all its aspects. In the most recent case of *New American Library* v. *Federal Trade Commission*, 213 F.2d 143 (2d Cir. 1954), the majority opinion not only held the public interest issue to be subject to judicial review and the Commission's order subject to review even in point of remedy, but also held that the situation was not one "in which the need to prevent deception has been shown to require the regimentation of an industry, threby depriving it of the benefit of legitimate enterprise in competition and denying to its product the quality of individualized treatment." It was then concluded by the majority that the public interest could be sufficiently protected by other means than those requested in the Commission's order.

Petitioner also seeks to derive some comfort from Professor Milton Handler (an eminent authority on this

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[24] In the cases. *Federal Trade Commission* v. *Algoma Co.*, 291 U.S. 67; *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (2d Cir. 1928), *cert. denied*, 277 U.S. (1928). *Gulter* v. *Federal Trade Commission*, 186 F. 2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818, and cases cited by petitioner, likewise involve strong fraudulent statements which is not true in the instant case.

subject), who is quoted as regarding the *Klesner* rule as "of minor if any importance" (Pet. Br. 33). This, we submit, is a misquotation of both Professor Handler's actual statement and of his views on the point involved. Professor Handler actually states, in his article, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399 (1940), at p. 404:

> "The *Klesner* case still retains its vitality, but its principal effect has been to exclude from the Commission's jurisdiction minor peccadillos and invasions of private rights."

However, he subsequently expresses his own views, just as did Mr. Henderson, *supra* p. 30, to the effect that the Commission should not act in cases in which a private remedy is clearly available and adequate. Said Professor Handler:

> "Here again, the private remedy being adequate, it is questionable whether public funds should be expended for the protection of private rights. There are, of course, cases where the brands and the manner of their use are so deceptive as to warrant action by a public body. The distinction is well illustrated by the *Masland* and *Klesner* cases. Respondents in the *Masland* case sold a product known as 'Duraleather,' an imitation leather. The Commission found that the brand not only infringed upon the registered mark 'Duro' used by a competitor on real leather but falsely implied that the product on which it was used consisted of genuine leather. The *Klesner* case involved the use of the trade name 'The Shade Shop,' in alleged violation of the rights of the first user of the name. The Commission was sustained in the first and reversed in the second case, the Supreme Court intimating that the repression of trade mark infringement and the simulation of another's brand were beyond the purview of the Commission's authority. There are, however, several rulings of the Circuit Courts of Appeal upholding the Commission's orders, and it is not improbable that its power to forbid this species of unfair

competition will be sustained notwithstanding the objections to which we have adverted." (*Id.* pp. 412, 413).

The cases referred to by Professor Handler in support of this last point are the very cases previously mentioned here, *Federal Trade Commission* v. *Real Products Corp., supra*, p. 34, and *Federal Trade Commission* v. *Balme, supra*, p. 32, in which the court had found actual fraud to the same extent as in the "Duraleather" case (*Masland Duraleather Co.* v. *Federal Trade Commission*, 34 F. 2d 733 (3d Cir. 1929).

In other words, Professor Handler, although relied upon by petitioner several times as an advocate of sounding the death knell to the *Klesner* case, is, in fact, one of the *Klesner* doctrine's staunchest supporters and has expressly taken the view that the use of an allegedly confusing trade name, without more, will not constitute the type of case which involves *the specific and substantial public interest*, without the presence of which neither the Federal Trade Commission nor the Civil Aeronautics Board may validly issue cease and desist orders under their respective organic acts.

2. The Lower Court Was Correct in Holding that the Present Case Involves No Substantial Public Interest.

We submit that it appears abundantly clear from the lower court's review of the entire record of this case, as it had the right and duty to do under this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), as well as from the dissenting opinion of Board Member Adams, that in essence the present case falls squarely within the substantive rule of the *Klesner* case and, if it were a Federal Trade Commission proceeding, within that Commission's Rule 1.21, under which the Commission will not take action "when the alleged violation of law is

merely a matter of private controversy and does not tend adversely to affect the public."

a) Lack of Public Interest Appears from the Procedural History of this Case.

In the first place, the lack of a public interest is apparent here even when looking only at the procedural history of the case. It was the intervenor who alone offered evidence of alleged confusion consisting solely of testimony of intervenor's employees. The examination for the most part was conducted by intervenor's attorney, with little participation by the Government. Moreover, as already noted in our preliminary observation (*supra*, p. 17 *et seq.*), it was the intervenor only who petitioned this Court for certiorari; apparently the Department of Justice did not deem the matter of sufficient public importance even at that point to join with the intervenor in a petition for certiorari. The Government's brief, submitted on behalf of the Board to this Court, is but a short summary and reiteration of the intervenor's main brief. It thus appears from the past history of the case that the administrative process of the Civil Aeronautics Board was permitted to be used not on behalf of a protection-deserving public but for the purpose of vindicating the intervenor's alleged exclusive rights in its trade name or service mark. In other words, the lower court was clearly correct in holding that if American Airlines, Inc., believed that its exclusive rights in its registered service mark, "American Airlines," were infringed upon by respondent's use of the name "North American," it should have instituted a conventional civil action for trademark infringement or unfair competition, which may or may not have resulted in private relief. We have not yet reached the point where a trademark owner, realizing perhaps the weakness of his position in an equity court, may seek more drastic relief by invoking the administrative processes of a Govern-

ment Agency which, while assumed to have expert knowledge and experience in all matters related to air transportation, lacks both the jurisdiction and the competence to pass upon a conflict between trademarks or trade names.

b) The Lower Court Correctly Found that the "Confusion" Was Unsubstantial and in Any Event Insufficient to Characterize the Use of Respondent's Name as "An Unfair or Deceptive Practice" Under Section 411.

There is no need here to review the total absence of any element of deception, actual misrepresentation, or fraud, since both the dissenting Board Member and particularly the lower court, at page 7 (R.417) of its decision, have done so quite extensively and since even the Hearing Examiner, whose findings were sustained by a majority of the Board, expressly found as follows:

> "There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation." (R. 197).

As stated by Judge Danaher in the lower court's unanimous opinion (R. 417, 418), there was no evidence whatever of actual passing off nor was it shown that any of American Airlines' passengers were actually confused to the advantage of North American, nor that any false representations on the part of North American were made in its advertising which may have enticed prospective American Airlines passengers away. The court went so far as to suggest that in fact the public may have benefited (R. 418) rather than have been deceived. Whatever actual "confusion" there was found to exist was correctly characterized by the dissenting Board Member

when he stated that he would have been greatly surprised, in view of the several million phone calls which American receives every year, "if there were not *some* demonstrable public confusion." (R. 212).

If such occasional and usually quite harmless confusion were all that would be required to enjoin absolutely the use of a trade name which was found to have been adopted and used without intention to defraud, then, we submit, a similar degree of confusion could easily be found among the equally or more confusing trade names or trademarks which are currently being used by most of the large certified airlines. Among the major airlines we find that one carrier does business under the name Northwest Airlines Inc., while another operates under Northeast Airlines, Inc., to say nothing of Eastern Airlines, Inc., and Western Airlines, Inc., or the similarity between American Airlines, Inc., and Pan American Airways, and the fact that in addition there are, as the lower court pointed out, several other carriers such as All American Airways, which had been using the word "American" for considerable periods of time.[25] Surely,

[25] The fact that Pan American has been using "American" in its trade name only in international air transportation is of no consequence. The distinction between domestic, international, and overseas air transportation, and which carriers provide an air service in these relatively arbitrary categories is at best obscure in the mind of the public. This obscurity has not been clarified by time. Pan American in a case presently before the Board is presently attempting to enter the domestic air transportation picture by acquiring a heavily travelled route between New York and Miami. *New York-Florida Case*, C.A.B. Docket No. 3051. At one time, petitioner, American Airlines, engaged in considerable international air transportation through American Overseas Airlines, Inc., the certificate of which was ultimately transferred to Pan American. *North Atlantic Transfer Case*, 11 C.A.B. 676 (1950). Even now, the Official Airline Guide map of petitioner's system (R.276), clearly depicts petitioner as an international carrier, serving such cities as Mexico City and Monterrey, Mexico, as well as Toronto, Canada. The Board's order, of course, is not limited to domestic

occasional confusion will arise between Northwest and Western, or Northeast and Northwest or American and Pan American, but none of these air carriers would be likely to go to the extent of suggesting to the Civil Aeronautics Board that it enjoin use of a competitor's name as an unfair trade practice under Section 411 of the Act. We believe that the lower court was entirely correct when it held, in accord with this Court's decisions in the *Klesner* case, the *Royal Milling* case, the *Raladam* case, and others referred to in the appendix to the court's decision (R. 433-435), that the past history and record of this case fall utterly short of evidencing a specific and substantial public interest or, for that matter, any demonstrable public interest whatsoever. It is not surprising then that the majority of the Board itself considered this case and the Board's order "unprecedented" which was also the characterization given to this case by the court below (R. 414). This case is indeed unprecedented and respondent hopes that upon this Court's affirmance of the lower court's decision, it will remain the first and only trade name controversy which will be submitted to the Civil Aeronautics Board for adjudication of a private dispute.

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air transportation. Respondent is prohibited from using its name in *all* air transportation.

Petitioner was in active competition with All-American from 1941 to 1949 in so far as the air transportation of mail was concerned. From 1949 until 1952, All-American competed with petitioner in the air carriage of passengers (R. 276, 286-291, 299-300). The fact that All-American is a small air carrier cannot be held against it (Pet. Br. 29).

c) Petitioner's Contention that the Issue of Trade Name Confusion Was Intended to Be Left for Determination by the Board Because of the Latter's Special Expertise in the Field of Aeronautics Is Without Merit.

It remains briefly to comment upon one other criticism found in petitioner's brief with regard to the lower court's reliance on the *Klesner* rule. Petitioner has suggested (Pet. Br. 37) that even if the *Klesner* rule be applicable law today, it should not have been applied to a proceeding under Section 411 of the Civil Aeronautics Act on the ground that

> "the Civil Aeronautics Board applies itself to the highly specialized questions of the air transport industry and is intended by Congress to have an expertness and to be relied upon in the application of the Act to a degree which could never be possible of an agency such as the Federal Trade Commission having only a sort of roving commission over the whole field of business." (Pet. Br. 37).

Reference is then made (Pet. Br. 38) to

> "the complex, dynamic and esoteric air carrier industry with which the Civil Aeronautics Board is concerned every minute of every day."

Petitioner has suggested that the lower court

> "undertook to cope with a question with which it is not equipped to cope and with which Congress never intended that it should be concerned." (*Ibid.*).

This is indeed a perversion of the purposes and function of the Board which refutes itself by a mere glance at the record in this case, and at the Examiner's and the Board's decisions. No one will deny that in matters concerning air traffic and aeronautics generally, the Board is supposed to be possessed of expert knowledge and judgment which may be entitled to great and often

controlling weight by a reviewing court; but it borders on absurdity to suggest that the right to the use of a certain trade name or trademark in connection with carrier services can, under any conceivable circumstances, fall within the Civil Aeronautics Board's domain of expert judgment, particularly where, as here, both the Examiner and the Board had to admit that a question of this nature had never been brought before them since the enactment of the Civil Aeronautics Act. There are hundreds of adjudicated cases, both federal and state, in which our courts have had to pass upon what the lower court here rightly characterized as the "complicated issues" of trademark and trade name infringement. Can it be seriously argued that the Civil Aeronautics Board is better equipped to adjudicate such matters than our equity courts, which have developed an entire branch of jurisprudence in this field? We are confident that this Court will not agree with the petitioner that the lower court's comprehensive and scholarly opinion justifies petitioner's charge that the court was not "equipped" to cope with the question of trade name infringement and that "the Congress never intended" that it should cope with that question. (Pet. Br. 38).

In summary, then, it is respondent's position that the question whether the use of the name "North American" is an infringement of American Airlines' rights is a matter primarily justiciable before our civil courts and not within the jurisdiction of the Civil Aeronautics Board. In other words, if it be true, as here argued, that the present case would not even be within the cognizance of the Federal Trade Commission for want of a substantial public interest, then it would seem to follow *a fortiorari* that the alleged misleading use of a trade name should not be held to be encompassed within the

regulatory administrative functions of the Civil Aeronautics Board.[26]

III

THE LOWER COURT DID NOT HOLD THAT SECTION 411 OF THE CIVIL AERONAUTICS ACT IS CONFINED TO PRACTICES INVOLVING FRAUDULENT INTENT, PALMING OFF BY DECEPTION, AND INJURY TO A COMPETITOR.

As has been previously pointed out, the lower court's opinion is actually based on the court's conviction that

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[26] It may not be amiss to call the Court's attention to a paper recently read by Former Federal Trade Commission Member, Albert A. Carretta, entitled *The F.T.C., Trademarks and Public Interest*, 45 Trademark Reporter 865 (August 1955). Not only did the former Commissioner state that the Commission's action in authorizing the filing of a complaint upon being satisfied that the proceeding would be in the public interest, is subject to judicial review, but Mr. Carretta went on to say:

"The problem concerning 'public interest' cannot be minimized. At the time the Commissioners are called upon to determine whether a complaint should issue, it is not always a simple matter to decide with certainty whether public interest, within the meaning of the Act, exists. Certainly, the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding [sic] public interest." And again:

"The Government of the United States should certainly do everything within its power to protect both businessmen and consumers against the improper use of trade-marks. But the Government should not spend taxpayers' money in an attempt to settle private controversies. It should proceed with caution therefore in handling cases of doubtful public interest."

Attention is then called by Mr. Carretta to the decision of the lower court in this case, and the former Federal Trade Commissioner expresses complete approval of the lower court's decision on the public interest issue. He states:

"It thus appears quite clear that where 'public interest' is a statutory factor, the Circuit Court for the District of Columbia Circuit is not receptive to the idea that the vast forces of the Federal government should be used to protect a name monopoly *unless adequate explanation can be made of the reasons why the 'public interest' requires such use.*"

the subject matter here involved was beyond the Board's jurisdiction and that this was not a case in which a public body "might be expected to provide a remedy in the public interest, where resort by an individual to the courts would largely be fruitless or impractical" (R. 431-432). It is respondent's position, as previously stated, that this ruling is eminently sound and in accord with all previous decisions of this Court. Petitioner, however, virtually erects a strawman by putting into the mouth of the lower court two alleged additional bases for its opinion which, in actual fact, were not so considered by the court itself. It is alleged in both petitioner's brief in this Court (p. 20), and in the Government's brief (p. 14 *et. seq.*), that the lower court erred in putting its "rincipal reliance" on the well known dictum by Mr. Justice McReynolds in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920), "that the phrase 'unfair method of competition' in Section 5 of the Trade Commission Act was 'clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression . . .". We agree with the petitioner that the quoted statement is not the law today and that since this Court's decision in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304 (1934), numerous forms of unfair competition have been held to come within the jurisdiction of the Federal Trade Commission under Section 5, despite the fact that they may not have been considered actionable under the private common law of unfair competition. But the lower court was not only completely aware of this but at the end of its opinion actually pointed out the types of unfair practices which might be properly considered unfair acts or practices under Section 411 of the Civil Aeronautics Act or Section 5 of the Federal Trade Commission Act even though no private remedy would lie in those instances. Indeed, the lower court quoted Mr. Justice Brandeis' dissenting opinion in the *Gratz* case, *supra*, in this con-

nection before reaching the conclusion that mere protection of a trade name monopoly was "far outside the scope of the powers entrusted to the Board" (R. 432).

The quotation from the *Gratz* case at page 13 of the lower court's decision (R. 423), of which so much is made by petitioner, is immediately qualified by a quotation from *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935), which went even further than the *Keppel* case in ruling that the term "unfair methods of competition" is not measured by common law standards. Even a casual reading of this part of the lower court's opinion will reveal that the references to the *Gratz* and *Schechter* cases were merely included further to strengthen the court's basic conviction that the protection of American Airlines' corporate name did not involve an issue of substantial public interest; these references were not included, as petitioner's brief suggests, for the purpose of holding that there could be no unfair method of competition in the absence of an actionable wrong at common law.

The same is even more true with regard to the lower court's alleged misreading or misapplication of this Court's decision in *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931) (Pet. Br. 23). Petitioner's brief (page 22) brands as "palpable error" the court's reference to this Court's holding in the *Raladam* case, that there could be no unfair method of competition in the absence of "competition". Petitioner then assumes that, in referring to the *Raladam* case at p. 14 of its decision (R. 424), the court below overlooked the fact that the competitive injury requirement was "legislated out of Section 5 of the Trade Commission Act by the Wheeler-Lea Amendment in 1938" (Pet. Br. 23). May we invite the Court's attention to the fact that the reference to the *Raladam* case by the lower court (R. 424) had nothing whatever to do with the requirement of "competition" but was mentioned *solely* as further proof that this Court had

insisted upon the requirement of a specific and substantial public interest in cases of this sort. Nor does the Wheeler-Lea Act of 1938 which added the words "unfair acts and practices" to Section 5, suggest or require any change or modification in the basic jurisdictional requirement of a specific and substantial public interest. As a matter of fact, the lower court expressly stated that the public interest requirement had not lost any of its force because of the 1938 amendment (R. 424).

Therefore, petitioner's charge of "palpable error", based on the court's alleged overlooking of the Wheeler-Lea Act of 1938, is refuted by the very next paragraph in the court's opinion which follows the reference to the *Raladam* case.

IV

THE LOWER COURT WAS CLEARLY CORRECT IN SUGGESTING THAT IT WAS ERROR FOR THE BOARD, EVEN IF IT WERE ASSUMED THAT IT HAD JURISDICTION OVER THE PRESENT CONTROVERSY, TO HAVE ISSUED AN ORDER ABSOLUTELY ENJOINING RESPONDENT FROM ANY USE OF ITS TRADE NAME OR OF ANY NAME WHICH MIGHT INCLUDE THE COMMON GEOGRAPHICAL TERM, "AMERICAN."

We hope to have established in the previous portions of this brief that the lower court's decision, setting aside the Board's order for lack of a specific and substantial public interest, was correct and should be affirmed by this Court.

In the event, however, that a majority of this Court should disagree with the lower court and with our previous arguments, it may become necessary briefly to

review the drastic sanction which the Board sought to impose on the respondent by enjoining the latter from using its corporate name or any name including the word "American."

A brief consideration of the point of remedy may not be amiss, therefore, particularly since the Hearing Examiner, in the initial decision in this matter dealt with this problem and since both the dissenting Board Member and especially the lower court by way of dictum, indicate strong disapproval of any order which would, in effect, compel respondent completely to abandon its corporate name and all use of the word North American. The Hearing Examiner, although stating that in this unprecedented case "one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under Section 5 of the Federal Trade Commission Act, which is essentially the same as Section 411 of the Civil Aeronautics Act," utterly failed even to consider the precedents set by this Court in connection with the remedy problem in Federal Trade Commission cases, but instead went on to review a line of decisions in private infringement suits in which the courts had held that, even a term such as "American" might acquire a secondary meaning and become entitled to protection against deceptive and unfair use by others. The Examiner then reached the following startling conclusion:

> "The courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception, or injury to the owner of the trade-mark." (R. 198).

Respondent candidly admits that it has been unable to find any case in which a trademark owner has been

granted relief in the absence of any fraud, deception or injury to himself but that, on the contrary, the courts, including this Court, have held on numerous occasions that any private right which a person may assert in a common geographical term, such as "American," should be most carefully circumscribed and limited. As against the cases cited by the Examiner (R. 225) and in petitioner's brief in this Court (p. 27, footnote 19), suffice it to refer to the precedents by this Court alluded to in the lower court's decision (R. 427). In addition to the cases there cited, attention may be called to the fact that in *American Steel Foundries* v. *Robertson, Commissioner*, 269 U.S. 372, 383 (1926), this Court cited with approval the following ruling by the Patent Office authorities:

> "It would be a serious matter if the law actually permitted anyone who chose to do so to organize a series of corporations with names containing these words, respectively and thereupon virtually withdraw these words from public use as trade-marks and monopolize them, by preventing their registry as such."

In *Columbia Mill Company* v. *Alcorn*, 150 U.S. 460 (1893), this Court held:

> "The word 'Columbia' is not the subject of exclusive appropriation under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark." (150 U.S. 460, 465).

And again:

> "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property." (150 U.S. 460, 466).

Subsequently, in passing on the registrability of the words, "The American Girl," as applied to shoes, this Court specifically stated that if the mark there involved had been "American Shoes," no exclusive rights of any sort could have been acquired in the word "American." *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251 (1915). Similarly, the lower court, in a decision by the late Chief Justice Vinson in *McGraw-Hill Pub. Co., Inc.* v. *American Aviation Associates, Inc.*, 117 F.2d 293 (D.C. Cir. 1940), decided that the publisher of a magazine entitled "Aviation" could not enjoin defendant from publishing a similar periodical under the name "American Aviation". We do not intend to burden this brief with additional references but have referred to a few pertinent cases in a foot note.[27]

It would thus seem clear that the lower court was correct in stating that even if the present case were to be decided under the guidance of available precedents in the field of the private law of unfair competition and trademarks, it would have been extremely doubtful whether an equity court would grant the drastic relief or would indeed give any relief at all under the circumstances of the present case.

But more fundamental than that is the Examiner's and the Board's failure to pay any attention whatever to this Court's repeated pronouncement in Federal Trade Commission cases to the effect that "complete excision" of an established trademark or trade name should not be ordered if a less drastic remedy would suffice to safeguard the public against confusion. The dissenting Board Member felt strongly that the majority went too far in issuing an absolute prohibition and thereby nullified the efforts

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[27] *American Automobile Association and California State Automobile Association* v. *American Automobile Owners Association* 13 P.2d 707 (Calif. Sup. Ct. 1932); *Olin Mathieson Chemical Corporation* v. *The Western States Cutlery and Manufacturing Company*, 227 F.2d 728 (10th Cir. 1955).

which respondent had made in building up public good will under the name North American. As far as Federal Trade Commission cases are concerned, the Court of Appeals for the Second Circuit held as long ago as 1938 in *Bear Mill Mfg. Co. v. Federal Trade Commission*, 98 F. 2d 67 (2d Cir. 1938), that corporate and trade names should not be destroyed when a lesser remedy would suffice. And this Court, in the case of *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933), in a decision which was left undisturbed in this regard by the Court's more recent decision in *Jacob H. Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), said:

> "The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the name." (288 U.S. 212, 217).

In the *Siegel* case, this Court, through Mr. Justice Douglas, reaffirmed the *Royal Milling* ruling by emphasizing that, under the express words of Secton 5 (c) of the Federal Trade Commission Act, the Court had power, *inter alia*, to *modify* the order of the Commission, but further held that judicial review in this regard was limited to an inquiry "whether the Commission abused its discretion in concluding that no change "short of excision" of the trade name would give adequate protection." (327 U.S. 608, 612). The Court, after reaffirming its policy against destruction of valuable business assets where less drastic means may accomplish the same result, found that the Commission had failed to give any consideration to the question whether a lesser remedy might have been sufficient and that the Court would not consider this question until the Commission had first expressly passed upon it. In the *Siegel* case—as in the present case—one of the members of the Federal Trade Commission wrote a brief dissenting opinion in which

the majority order was criticized as too harsh. After remand, a majority of the Commission reached the conclusion that complete excision of the trade name "Alpacuna" would result in undue hardship on the respondent and was not necessary for the protection of the public.

It is pointed out in petitioner's brief (page 15, footnote 7) that the issue of the scope of the Board's order was not expressly raised in the petition for review and that consequently, the problem dealt with in the *Siegel* case was not presented here. Respondent suggests, however, that since the Examiner, the majority of the Board, and the dissenting Board Member, as well as the lower court, extensively commented upon this aspect of the case, it must necessarily enter into the Court's consideration of the matter if, contrary to the lower court, this Court should come to the conclusion that the issue of the Board's order was within the latter's jurisdiction under Section 411 of the Civil Aeronautics Act. In that event, respondent submits, the complete disregard by the Examiner and by the majority of the Board of the established policy in cases of this sort, not to order absolute excision of trade names or corporate names where less drastic remedies may be available, and the lack of any indication in either the Examiner's initial decision or the Board's opinion that any alternative or less radical action was even considered, serve to fortify the lower court's conclusion that the Board, even if it had any jurisdiction over the present controversy in the first instance, failed properly to exercise it. It further serves to reemphasize that, contrary to petitioner's view, our courts are better equipped to adjudicate private issues of trademark infringement or unfair competition than an independent regulatory Government agency, and that Congress never intended, as petitioner suggests, that the

Civil Aeronautics Board should concern itself with predominantly private disputes of this nature.[28]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below, reversing the order of the Civil Aeronautics Board, was correct and should be affirmed by this Court.

Respectfully submitted,

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[28] *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623 (1927): "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. (Citing cases). It has not been delegated the authority of a court of equity."